No. 83-838

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

PAUL B. LORENZETTI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent concedes (Br. in Opp. 4-5), as he must, that there is a direct conflict between the Third Circuit's decision in this case and the Sixth Circuit's decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (1981). In an effort to support the decision below, however, respondent obfuscates the issue in the case and departs from the court of appeals' own reasoning.

Respondent's emphasis on the state law basis of a federal employee's right to recover from a third-party tortfeasor (Br. in Opp. 5-8) simply misses the point of the question presented. That question is whether, once a federal employee has recovered damages in a tort action against a third party, he should be relieved of his obligation under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8132, to reimburse the federal government for compensation payments it made to him on the ground that (because of the effect of a state no-fault insurance scheme) the damages

he recovered do not include payments for medical expenses and lost wages. The FECA itself creates no cause of action in tort against persons who injure federal workers; nor is the existence of such a cause of action at issue in this case.

The FECA does impose an obligation on a federal employee to reimburse the government for payments he receives from the compensation fund in certain circumstances. When (i) an employee sustains an injury for which compensation is payable under the FECA, (ii) the injury is caused under circumstances creating a legal liability in a third party other than the United States to pay damages, and (iii) the employee in fact recovers damages, the employee must refund the amount of benefits paid on his behalf (after various statutory deductions). Respondent meets these conditions and therefore (under our reading of Section 8132) has incurred an obligation to reimburse the compensation fund under federal law, regardless of the operation of any state no-fault insurance scheme. The conflict created by this case concerns the proper interpretation of the federal statute, not any disputed question of state law.

2. Respondent errs in contending (Br. in Opp. 8-11) that Congress intended 5 U.S.C. 8132 to operate as an equitable subrogation provision. Section 8132 was designed in large part to minimize the cost of the compensation program by providing for replenishment of the fund (see Pet. 13-15); the duty of reimbursement it prescribes is not dependent on any subrogation principle. In any event, in amending Section 8132 in 1974,[1] Congress responded to equitable concerns about the operation of Section 8132 by permitting an employee to retain at least one-fifth of his tort recovery after the payment of costs and attorney's fees. See Pet. 17. In view

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[1]Respondent errs in representing (Br. in Opp. 10) that Section 8132 was last amended in 1966. Our petition (at 16-17) discusses the 1974 amendments to Section 8132.

of the 1974 amendment, there is no reason to invoke inapplicable principles such as subrogation in order to do equity.

3. We note that the decision in this case has already begun to have repercussions, even beyond the no-fault context. In *Green* v. *United States Dep't of Labor*, Civ. No. 3-82-1282 (D. Minn. Dec. 16, 1983), the court cited the court of appeals' decision in this case in support of its holding that the government could not obtain reimbursement under the FECA from an employee's third-party tort recovery because the employee had been barred from pleading or proving damages covered by FECA benefits in the tort action on the ground that he was not the real party in interest. The court in *Green* concluded that the facts there were "indistinguishable" from the facts of this case, since the employee in *Green* "was affirmatively prevented from asserting his claim for past lost wages and medical expenses" (although for a reason other than operation of a no-fault scheme) (slip op. 8-9).[2] Thus, in addition to the state-by-state litigation in no-fault jurisdictions that we anticipated in our petition (at 8-10), it appears that the government may be required as well to litigate the interpretation of the FECA in states without no-fault insurance schemes.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JANUARY 1984

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[2]Copies of the slip opinion in *Green* are being lodged with the Clerk of the Court and provided to respondent's counsel.


Brief for
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BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a federal employee who has received Federal Employees' Compensation Act benefits for injuries suffered in the course of his employment is obligated by 5 U.S.C. 8132 to reimburse the United States out of damages recovered from a negligent third party when a state no-fault automobile insurance statute allows such tort recovery for pain and suffering but not for medical expenses and lost wages.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 710 F.2d 982. The opinion of the district court (Pet. App. 13a-18a) is reported at 550 F. Supp. 997.

JURISDICTION

The judgment of the court of appeals (Pet. App. 12a) was entered on June 22, 1983. On September 13, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including November 19, 1983. The petition for a writ of certiorari was filed on November 18, 1983, and was granted on January 16, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional, statutory and regulatory provisions are reproduced in App., *infra*, 1a-6a.

STATEMENT

1. a. The Federal Employees' Compensation Act (FECA or the Act), 5 U.S.C. 8101 *et seq.*, establishes a comprehensive program of compensation benefits for government employees injured in work-related accidents. If an employee is injured "while in the performance of his duty" (5 U.S.C. 8102(a)), he is entitled to compensation for expenses of medical and related services (5 U.S.C. 8103, 8111) and of vocational rehabilitation (5 U.S.C. 8104) and for a percentage of his lost wages (5 U.S.C. 8105-8107, 8110). Benefits may be paid to an employee's survivors in the case of death (5 U.S.C. 8133, 8134). The FECA was designed to give injured federal employees a speedy and certain recovery for work-related injuries, regardless of fault or contributory negligence and without the need for litigation or expense. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 4; *Johansen* v. *United States*, 343 U.S. 427, 439-441 (1952); *Dahn* v. *Davis*, 258 U.S. 421, 431 (1922).

The liability of the United States under the FECA is exclusive (5 U.S.C. 8116(c)); thus, an employee who sustains a compensable injury may not sue the United States in tort. However, if an employee sustains a compensable injury "creating a legal liability on a person other than the United States to pay damages," the Secretary of Labor may require the employee to assign his cause of action to the United States or to bring a third party action in his own name (5 U.S.C. 8131(a)). If the employee refuses to assign or prosecute his cause of action, he is not entitled to receive FECA compensation (5 U.S.C. 8131(b)).

The FECA provides that the government is entitled to receive reimbursement for benefits it has paid in connection with an injury out of any recovery from a third party tortfeasor. If the employee assigns his cause of action to the United States, the Secretary may prosecute or compromise the action, and any recovery must first satisfy the FECA compensation fund for the amount of benefits paid to the employee. This provision is qualified by the requirement that the employee receive at least one-fifth of the net amount of the settlement or recovery (after deduction of the Secretary's expenses of settlement or recovery). 5 U.S.C. 8131(c).

If the employee himself receives "money or other property" in satisfaction of the legal liability of a third party to pay damages, he may deduct the cost of recovery, including a reasonable attorney's fee, and may retain one-fifth of the net amount. Following these deductions, the employee must reimburse the FECA compensation fund for any benefits already paid to him and must credit the surplus to future compensation payments for the same injury. 5 U.S.C. 8132. The Act provides that "[n]o court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States" (*ibid.*). Pursuant to 5 U.S.C. 8149, the delegation of rulemaking authority, the Secretary of Labor has promulgated 20 C.F.R. 10.503, which sets out procedures for reimbursement of the FECA compensation fund from third party recoveries.

b. The Pennsylvania No-Fault Motor Vehicle Insurance Act (No-Fault Act), Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983), became effective in 1975. The primary purpose of the No-Fault Act is to provide, at reasonable cost, prompt and adequate basic loss benefits to victims of motor vehicle accidents and their survivors. See *id.* § 1009.102(b). To

accomplish this goal, the No-Fault Act provides for the payment of benefits covering basic economic losses on a first party basis, *i.e.*, an accident victim's own insurance company pays for basic losses (including an unlimited amount of medical expenses and lost wages up to $15,000), regardless of fault (*id.* §§ 1009.104, 1009.106, 1009.202). The No-Fault Act defines "basic loss benefits" that must be paid by the no-fault insurer as "net loss sustained by a victim, subject to any applicable limitations [or] exclusion * * *" (*id.* § 1009.103). In computing "net loss," a no-fault insurer may deduct any government benefits, including workers' compensation, that the victim receives or is entitled to receive because of his injury, "unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act * * *" (*id.* § 1009.206(a)). Accordingly, a no-fault insurer in Pennsylvania is not required to pay benefits for losses that also are covered by a program such as the FECA.

The No-Fault Act partially abolishes tort liability for injuries that take place in Pennsylvania if they arise out of the use and maintenance of a motor vehicle. A victim may not obtain a tort recovery for economic losses (*e.g.*, medical expenses and lost wages), except to the extent they are not compensated because they exceed statutory no-fault limits. Pa. Stat. Ann. tit. 40, § 1009.301(a)(4) (Purdon Cum. Supp. 1983). Thus, a tortfeasor is not liable for medical expenses or the first $15,000 in lost wages, since the No-Fault Act requires the no-fault insurer to pay all such expenses; however, a tortfeasor would be liable for any lost wages over and above the $15,000 statutory ceiling on no-fault coverage for that category of loss. A tortfeasor remains liable for damages for noneconomic losses (*e.g.*, pain and suffering) if an accident results in death or serious and permanent injury, if the reasonable value of necessary medical and dental services exceeds $750, or if the vic-

tim is disabled for more than 60 days or suffers serious and permanent disfigurement (*id.* § 1009.301(a)(5)).

2. Respondent is a special agent for the Federal Bureau of Investigation. He was injured in Pennsylvania in November 1977 when the automobile he was driving was struck by another vehicle. At the time of the accident, respondent was performing duties in the scope of his employment. Accordingly, he received FECA benefits covering his medical expenses and a percentage of his lost wages. Pet. App. 2a.

In 1979, respondent filed a tort action in the Court of Common Pleas of Philadelphia County against the driver of the vehicle that struck his automobile. Based on the FECA benefits it had paid, the federal government asserted a lien against any recovery by respondent. The driver of the other vehicle moved to exclude proof of medical expenses and lost wages, on the ground that, under the terms of the No-Fault Act, damages for such losses may not be recovered from a tortfeasor. The Court of Common Pleas agreed that respondent should not be permitted to prove such amounts, including the sum paid to respondent by the United States in the form of FECA benefits. Respondent ultimately settled the tort action for $8,500. The settlement figure represented compensation only for noneconomic losses, *i.e*, pain and suffering. Pet. App. 6a, 14a.

Pursuant to 5 U.S.C. 8132, the United States asserted its right to be reimbursed from respondent's settlement in the amount of $1,600.24, representing FECA benefits he had received.[1] Respondent then filed

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[1] The total amount of FECA benefits paid to respondent was $1,970.81. That amount includes compensation for both medical expenses and lost wages. In computing the amount of reimbursement owed by respondent, the government deducted $350.57, representing the government's share of the reasonable attorney's fee. The balance (actually $1,620.24, but shown as $1,600.24 on Department of Labor documents, apparently due

this declaratory judgment action in the United States District Court for the Eastern District of Pennsylvania to prevent the government from recovering the amount of the FECA benefits. Respondent contended that because the No-Fault Act precluded him from recovering damages for medical expenses and lost wages from the tortfeasor, the government should be barred from obtaining reimbursement from him to cover the benefits it had paid to compensate him for such losses.

3. The district court granted summary judgment for the United States (Pet. App. 13a-18a). The court held that the government was entitled to seek reimbursement from respondent's third party tort recovery, even though that recovery represented compensation only for his noneconomic losses, not for his medical expenses and lost wages. In concluding that all third party recoveries give rise to a duty to reimburse the government, the district court relied in large part on the decision in *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d 229 (6th Cir. 1981), which addressed the identical issue in a case involving the Michigan no-fault statute. The Sixth Circuit held in *Ostrowski* that the FECA unambiguously subjects all damages recovered from third parties to the obligation to reimburse the FECA compensation fund.

4. The court of appeals reversed (Pet. App. 1a-11a), expressly rejecting the Sixth Circuit's decision in *Ostrowski* (Pet. App. 5a). The court of appeals recognized that one of the primary purposes of the FECA reimbursement provision is to reduce the costs of the

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to a computational error) represents the amount respondent was asked to reimburse.

The district court stated (Pet. App. 13a n.1) that the government claimed only $1,044.38, following deduction of an attorney's fee from total benefits of $1,600.24, pursuant to 5 U.S.C. 8132. In fact, the figure of $1,600.24 already reflects the deduction of an attorney's fee, as the preceding paragraph indicates.

compensation program *(ibid.)*. It concluded, however, that requiring reimbursement in cases in which a federal employee could not recover tort damages for medical expenses and lost wages would be "manifestly unfair" to those employees who are subject to state no-fault statutes (*id.* at 7a).

The court of appeals remarked that reimbursement of the federal government in such circumstances would not serve to prevent double recovery or to foster ease of administration and would be inconsistent with Congress's perceived intent to make the government a "model employer" (Pet. App. 8a). In the latter regard, the court of appeals cited *Brunelli* v. *Farelly Bros.*, 266 Pa. Super. 23, 28, 402 A.2d 1058, 1061 (1979), which held that under Pennsylvania law workers' compensation carriers cannot be subrogees for money paid in a tort action confined to noneconomic loss under the state no-fault law. The court suggested that the FECA could be read in a similar manner in order to "put federal employees on an equal footing with their counterparts in private industry and * * * allow for a fair result under the terms of the statute" (Pet. App. 9a).

SUMMARY OF ARGUMENT

A. 1. The plain language of 5 U.S.C. 8132 provides that a FECA beneficiary who has received "money or other property" in satisfaction of a third party's liability for an injury must use that recovery to reimburse the compensation fund for the amount of FECA benefits he has received in connection with that injury. There is no suggestion in the statute that reimbursement is to be made only from the portions of a third party recovery that represent damages for medical expenses and lost wages. Other parts of the FECA, including the provision that the Secretary of Labor may require employees to assign their third party claims to the United States, reinforce the conclusion that Section 8132

should be construed in accordance with its plain meaning.

The Secretary has long interpreted the FECA as requiring reimbursement of the compensation fund from any part of an employee's third party recovery. That construction of the statute by the official charged with its administration is entitled to deference.

Reimbursement provisions of other compensation statutes have been construed as requiring reimbursement from any portion of a beneficiary's third party recovery, including amounts representing damages for pain and suffering. In particular, courts have concluded that the reimbursement provisions of the Railroad Unemployment Insurance Act and the New York workers' compensation statute require reimbursement from third party recoveries, even when a state no-fault statute limits such recoveries to noneconomic losses.

2. The legislative history of the FECA does not suggest that Congress intended employees to reimburse the compensation fund only from damages for medical expenses and lost wages. Although Congress must have been aware that there would be cases in which reimbursement necessarily would come out of an employee's damages for noneconomic losses, it made no attempt to shield such damages from the obligation to reimburse. In recent amendments to the FECA, Congress has not curtailed the reimbursement obligation in response to state no-fault statutes, but rather has strengthened it.

B. The requirement that a FECA beneficiary reimburse the United States from his third party recovery, whether or not it includes damages for medical expenses and lost wages, is consistent with the congressional purposes underlying Section 8132. The primary purpose of that provision is to minimize the costs of the FECA program. Requiring reimbursement from any third party recovery clearly increases the amounts available for defraying those costs.

Requiring reimbursement from any third party recovery also furthers administrative efficiency by allowing the Secretary to apply uniform reimbursement procedures throughout the country. The court of appeals' contrary interpretation of the statute would impose a significant administrative burden on the Secretary, who would be required to adjust the federal scheme on a state-by-state basis to accommodate the numerous variations in no-fault schemes.

The court of appeals was impressed by the fact that reimbursement is not necessary to prevent double recoveries by employees in cases in which a state no-fault statute limits tort liability. But the court itself recognized that reimbursement may be required in some situations in which there is no possibility of double recovery.

C. The court of appeals' reasons for departing from the plain language of the statute cannot withstand scrutiny. The court's "reinterpretation" of the FECA to take account of a recently enacted state no-fault insurance scheme disregards this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 11 (quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980)).

The court of appeals' citation of the Senate committee's statement that the 1974 FECA amendments would help the federal government to be a "model employer" is insufficient support for the court's attempted rewriting of Section 8132. Moreover, the court's suggestion that there is "unfairness" in the FECA scheme that would justify such judicial rewriting is incorrect, particularly in light of Congress's provision that employees may keep one-fifth of any third party tort recovery.

The court of appeals clearly erred in concluding that the reimbursement provision must be read out of the federal statute in order to accommodate the operation of the state no-fault scheme. While states may change the relationships among parties subject to state control, they may not alter the rights of the federal government under a federal statute. Only Congress can alter the FECA reimbursement provision, and there is no indication that it has chosen to do so. Thus, the FECA requires respondent to reimburse the United States from his third party recovery in this case.

ARGUMENT

A FEDERAL EMPLOYEE WHO HAS RECEIVED FEDERAL EMPLOYEES' COMPENSATION ACT BENEFITS FOR INJURIES SUFFERED IN THE COURSE OF HIS EMPLOYMENT MUST REIMBURSE THE UNITED STATES OUT OF DAMAGES RECOVERED FROM A NEGLIGENT THIRD PARTY IN CASES IN WHICH A STATE NO-FAULT AUTOMOBILE INSURANCE STATUTE PERMITS TORT RECOVERY ONLY FOR LOSSES OTHER THAN MEDICAL EXPENSES AND LOST WAGES

The Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, establishes a comprehensive workers' compensation scheme under which federal employees or their survivors receive benefits, regardless of considerations of fault, for employment-connected injuries or death. Almost three million persons are covered by the Act, and FECA payments by the federal government are in the range of $1 billion per year.[2]

Under the Act, employees who are eligible to receive FECA benefits may not pursue a tort action against the

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[2] See *Report of the Comptroller General: Labor Department Is Strengthening Procedures to Recover Costs for Federal Employees' Injuries Caused by Third Parties*, 1 (May 9, 1979); U.S. Office of Management and Budget, *Appendix to Budget of the United States Government, Fiscal Year 1985*, at I-013.

government in connection with such injuries. However, the Act does not preclude a third party tort action in cases in which an entity other than the federal government contributed to a work-related injury. Since its enactment in 1916, the FECA has provided that the Secretary of Labor may require that the injured employee assign to the United States his right of action against a third party; alternatively, the Secretary may require the employee to prosecute the action in his own name. Under the first alternative, the Secretary retains the amount of compensation paid on account of the injury and returns the excess to the employee. Under the second alternative, the employee must reimburse the United States from his third party recovery in the amount of FECA compensation paid to him. See 5 U.S.C. 8116(c), 8131, 8132.

The issue in this case arises as the result of the simultaneous operation of this longstanding FECA scheme and the Pennsylvania no-fault automobile insurance statute, which became effective in 1975. Under the Pennsylvania statute, an individual's own insurer is responsible for paying benefits for basic economic losses (*i.e.*, medical expenses and lost wages up to a ceiling amount) resulting from an automobile accident. An individual whose injury is serious may bring a tort action against another driver, but may not collect damages for expenses defined as basic economic losses under the no-fault statute. A no-fault insurer need not pay benefits to the extent workers' compensation is available to an individual; but even when the individual receives workers' compensation rather than no-fault benefits, he may not obtain a tort recovery for any amounts defined as basic economic losses.

The federal and state statutes combine to create the situation faced by respondent in this case: a federal employee who is involved in a work-related automobile accident receives FECA benefits to cover his medical ex-

penses and lost wages; when he sues a third party tortfeasor, state law prevents him from recovering damages for medical expenses and lost wages to the extent they are below the ceiling set by the no-fault statute, so that his recovery includes only damages for noneconomic losses (*e.g.*, pain and suffering); the employee nevertheless is required by the federal statute to use his third party recovery to reimburse the United States for any FECA compensation payments he has received.

The court of appeals viewed this result as "manifestly unfair" to federal employees, who must use the damages they recover for noneconomic losses to reimburse the federal government for amounts it has expended to compensate for economic losses. However, the court did not recommend that the Pennsylvania legislature revise the no-fault statute to correct the situation. Nor did it search for an interpretation of the Pennsylvania statute that might alleviate any hardship to federal employees. Finally, the court did not recommend that Congress amend the FECA to take account of the operation of the Pennsylvania no-fault statute. Instead, the court proceeded in effect to read the reimbursement provision out of the federal statute in cases in which a state no-fault statute limits an employee's third party tort recovery.

We submit that the plain language of the FECA requires reimbursement of the United States from respondent's third party recovery. Consideration of the legislative history, legislative purposes, and relevant principles of statutory construction support that conclusion. The court of appeals' interpretation of the reimbursement provision is contrary to principles this Court has followed in construing provisions of federal statutory compensation schemes and should be rejected.

A. The Plain Language and Legislative History of 5 U.S.C. 8132 Indicate That a Federal Employee Who Receives FECA Benefits for Injuries Suffered in the Course of His Employment Must Reimburse the United States Out of Any Damages Recovered From a Negligent Third Party

1. a. The starting point in construing a statute is the language of the statute itself. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reimbursement provision of the FECA, 5 U.S.C. 8132, states in pertinent part:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary * * * receives money or other property in satisfaction of that liability * * * the beneficiary * * * shall refund to the United States the amount of compensation paid * * *.

Section 8132 unequivocally provides that when a FECA beneficiary has suffered an injury for which a third party is legally liable to pay damages, and the beneficiary recovers "money or other property" in satisfaction of that liability, the beneficiary must (after making certain deductions described in the statute) apply that recovery to reimburse the United States for the amount of FECA benefits received. There is no indication of any kind in Section 8132 that the employee's duty to reimburse the compensation fund depends on any provision of state law or on whether the third party recovery includes damages for medical expenses and lost wages.[3] As the Sixth Circuit noted in *Ostrowski* v.

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[3] In his Brief in Opposition (at 5-11), respondent characterized the government's right to reimbursement under Section 8132 as essentially a right of subrogation that depends on the employee's rights under state law and that can be destroyed if the state abolishes tort liability for medical expenses and lost wages. Those contentions are incorrect. Section 8132 on its face

Dep't of Labor, OWCP, 653 F.2d 229, 230 (1981) (quoting 479 F. Supp. at 203), "[t]here is no language in Section 8132 delineating two classes of damages—one of which gives rise to a duty to reimburse and one of which does not. On the contrary, by its terms the duty to reimburse encompasses all damages recovered from third parties." See also *United States* v. *Hayes*, 254 F. Supp. 849, 851 (W.D. Ky. 1966) (noting that the reimbursement provision, then 5 U.S.C. (1964 ed.) 777, "is clear and unambiguous, and makes no provision for the segregation or division of damages"). Here respondent recovered "money or other property" in satisfaction of a "liability" of a third party that resulted from a work-related injury. Thus, under the terms of the statute, he must "refund to the United States the amount of [FECA] compensation paid."[4]

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is not based on any right of subrogation; rather, it creates an independent right of reimbursement from whatever amount an employee has been able to recover from a third party on account of the circumstances leading to the payment of FECA benefits. Section 8131, the provision for assignment of an employee's claim to the United States, could be characterized as a subrogation provision. But in any event, neither section limits the government's rights to damages attributable to medical expenses and lost wages.

[4] The wording of Section 27 of the Act of Sept. 7, 1916, ch. 458, 39 Stat. 747-748, the original reimbursement provision, reinforces the conclusion that reimbursement must be made from all damages awards. Section 27 provided that an employee who receives "*any* money or other property in satisfaction of the liability" of a third party for his injury shall "apply the money or other property" as a refund to the United States (emphasis added). The word "any" was dropped in 1966 when Title 5 was recodified. See Pub. L. No. 89-554, § 1, 80 Stat. 547. However, the 1966 recodification was not designed to make any substantive change in the law. Pub. L. No. 89-554, § 7(a), 80 Stat. 631.

The court of appeals concluded that it was necessary to go beyond the language of the statute, citing *Rose* v. *Lundy*, 455 U.S. 509, 517 (1982), for the proposition that if Congress could not have anticipated the concept of no-fault insurance at the

Other provisions of the FECA support the conclusion that the language of Section 8132 should be read in accordance with its plain meaning. Under 5 U.S.C. 8131 the Secretary may require an employee to assign to the United States his right of action against a third party. The Secretary may then prosecute or compromise the action and, when he realizes on the cause of action, "he shall deduct therefrom and place to the credit of the Employees' Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection." 5 U.S.C. 8131(c). Under Section 8131, the Secretary could require assignment in any case in which an employee's third party recovery would be affected by a no-fault scheme, could prosecute and recover on the employee's "cause of action," and could then retain any portion of the recovery necessary to cover the FECA benefits paid to the employee.

On its face, Section 8131 allows the Secretary to exercise complete control over the conduct of any third party action as an alternative to prosecution of the action by the employee and reimbursement under Section 8132. Moreover, it is the employee's "cause of action" that is assigned to the United States under Section 8131, not merely his right to recover certain elements of damages. Thus, it seems clear that the Secretary himself could sue on the employee's "cause of action" for negligence and could recover (and retain) any sort of damages the employee himself could receive under that cause of action, including damages for pain and suffer-

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time it drafted the statute, it was necessary to analyze the statutory purposes in order to determine the proper scope of the statute. Pet. App. 6a-7a. But in *Rose* v. *Lundy* the Court found the statutory language to be ambiguous, while here the statute is clear on its face. In any event, as we show in Part B of this brief, a literal reading of Section 8132 is consistent with the congressional purposes underlying its enactment.

ing. There is no reason not to read Section 8132 generously to correspond to the broad scope of the companion section.

The exclusive liability provision of the FECA, 5 U.S.C. 8116(c), also lends support to a reading of Section 8132 that is consistent with its broad language. The fact that a federal employee's exclusive remedy against the government for work-related injuries is under the FECA in effect means that FECA benefits constitute compensation for any liability the United States might otherwise have, not just liability for economic losses. Indeed, if there had been no third party tortfeasor in this case, respondent would have received only FECA compensation and would have had no opportunity to recover additional damages for, *e.g.*, pain and suffering. See *Lockheed Aircraft Corp.* v. *United States*, No. 81-1181 (Feb. 23, 1983), slip op. 3-4. Therefore, it can hardly be viewed as unreasonable to require that an employee apply all classes of damages to reimburse the government for benefits it has paid in cases in which there happens to be a third party tortfeasor.

b. The Secretary of Labor has long construed 5 U.S.C. 8132 to require reimbursement from any third party recovery, regardless of the elements of damages that make up the recovery. That construction by the official responsible for administration of the FECA is entitled to deference. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 10; *Miller* v. *Youakim*, 440 U.S. 125, 144 & n.25 (1979); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

Under 5 U.S.C. 8149, Congress has delegated to the Secretary the authority to "prescribe rules and regulations necessary for the administration and enforcement" of the FECA. In the exercise of that authority, the Secretary has promulgated 20 C.F.R. 10.503, which provides (emphasis added) that if, in an action against a third party tortfeasor, "the beneficiary shall recover

damages or receive *any* money or other property in satisfaction of the liability of such other person on account of [a work-related] injury or death, the proceeds of such recovery shall be applied" as reimbursement for FECA benefits paid.[5]

The Secretary has consistently taken the position that Section 8132 requires an employee to reimburse the government from any damages award, even if the award represents only damages for pain and suffering. Compare *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 10. The Secretary has taken this position in the context of a no-fault scheme (*Ostrowski* v. *Dep't of Labor, OWCP, supra*) and in a case involving an employee's claim that a settlement he obtained represented only compensation for pain and suffering (*United States* v. *Hayes, supra*). In both instances the courts upheld the Secretary's interpretation of Section 8132 and rejected the employees' attempts to avoid the statutory duty to reimburse the United States.[6]

c. The Secretary's construction of Section 8132 is reinforced by the fact that courts have construed similar provisions under other statutory compensation schemes to require reimbursement from any element of damages included in a third party tort recovery. For example, the Railroad Unemployment Insurance Act grants the

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[5] The reference in the regulation to "any money or other property" appears to date from at least 1938. See 20 C.F.R. 3.4 (1965) and source note for 20 C.F.R. Pt. 3 (1965).

[6] In *Ostrowski* the Michigan no-fault statute barred the plaintiff from recovering for his economic losses in a third party action. Plaintiff sought a declaratory judgment construing Section 8132 as requiring reimbursement only to the extent the third party recovery was attributable to the types of economic benefits conferred under the FECA (*e.g.*, medical expenses and lost wages). In *Hayes* the defendant refused to reimburse the FECA compensation fund, alleging that his settlement with a third party tortfeasor represented only damages for pain and suffering.

Railroad Retirement Board a right to reimbursement from any third party recovery by a beneficiary under that Act. 45 U.S.C. 362(*o*).[7] In *United States* v. *Rogers*, 658 F.2d 296 (1981), the former Fifth Circuit construed that provision as requiring full reimbursement despite the limitations on tort liability for automobile accidents imposed by the Georgia no-fault statute. The court of appeals rejected the contention of the beneficiary in that case that the Board could not obtain reimbursement of $3,250 in benefits it had paid to her because under the Georgia no-fault statute she was precluded from recovering the first $5,000 of her economic loss. The court held that "[u]nder the clear language of the federal statute, whether or not Georgia law restricts Rogers' recovery to certain types of damages is irrelevant to the Board's right of reimbursement." 658 F.2d at 297. The court went on to state that "[t]he Board's right of reimbursement under the Act cannot be restricted by state law" *(ibid.)*.

Similarly, the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.*, requires that beneficiaries use any third party recovery to reimburse the employer in an amount equivalent to compensation paid under that Act. Although that requirement apparently has not been interpreted in conjunction with a state no-fault statute, courts have concluded in related circumstances that the employer may obtain reimbursement from all parts of an employee's third party recovery, including damages

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[7] 45 U.S.C. 362(*o*) provides in pertinent part:

> The Board shall be entitled to reimbursement from any sum or damages paid or payable to such employee [with respect to days of sickness] * * * through suit, compromise, settlement, judgment, or otherwise on account of any liability * * * based upon such infirmity, to the extent that it will have paid or will pay benefits for days of sickness resulting from such infirmity.

for pain and suffering. In *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), cert. denied, 385 U.S. 1020 (1967), an injured longshoreman, whose third party tort recovery was reduced by 50% on account of his contributory negligence, contended that he should not be required to reimburse a compensation carrier from the portion of his damages that represented compensation for pain and suffering because such loss was not specifically compensable under the LHWCA. The Fifth Circuit rejected that contention, noting that LHWCA payments are made in lieu of all damages to which a beneficiary otherwise would be entitled, not just medical expenses or lost wages. The court held that Section 33 of the LHWCA, 33 U.S.C. 933, "makes it clear that the compensation insurer shall recover *in full* its payments from the *total* recovery obtained by the injured workman from a third party defendant, regardless of what that recovery replaces or is termed by the court." 362 F.2d at 350 (emphasis in original). Accord, *Ballwanz* v. *Jarka Corp.*, 382 F.2d 433, 436-437 (4th Cir. 1967); *Chouest* v. *A&P Boat Rentals, Inc.*, 321 F. Supp. 1290, 1292-1293 (E.D. La. 1971), rev'd on other grounds, 472 F.2d 1026 (5th Cir.), cert. denied, 412 U.S. 949 (1973).[8]

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[8] In *Heusle* v. *National Mutual Insurance Co.*, 628 F.2d 833 (1980), the Third Circuit construed the Medical Care Recovery Act, 42 U.S.C. 2651(a), as not requiring reimbursement to the government for medical expenses that were excluded from an employee's third party recovery by operation of the Pennsylvania no-fault statute. However, the wording of Section 2651(a) differs from that of the FECA reimbursement provision. Section 2651(a) refers to reimbursement from a third party tort recovery of "damages therefor," a term the court in *Heusle* thought referred back to expenses for medical care, mentioned earlier in Section 2651(a). 628 F.2d at 837. We believe the court in *Heusle* misconstrued Section 2651(a), but that in any event *Heusle* is distinguishable from this case because of the difference in wording of the FECA provision.

State courts generally have given a similar construction to reimbursement provisions in state workers' compensation statutes. The majority rule in the states is that an employee must reimburse his employer from any portion of his third party recovery, including damages solely for pain and suffering.

> [I]t is quite clear, as the cases now stand, that the prevailing rule in the United States refuses to place an employee's third-party recovery outside the reach of the employer's lien on the ground that some or all of it was accounted for by damages for pain and suffering. Indeed, this result has been reached even when the employee had taken the trouble to put his pain and suffering claim into a separate suit.

2A A. Larson, *The Law of Workmen's Compensation* § 74.35, at 14-476 to 14-478 (1983) (footnotes omitted). See, *e.g.*, *Hendry* v. *Industrial Comm'n*, 112 Ariz. 108, 538 P.2d 382 (1975), cert. denied, 424 U.S. 923 (1976) (carrier's lien extends to employee's entire third party recovery, including pain and suffering; plain language of the statute, which refers to "total recovery" and amount "actually collectible" controls, even if it might sometimes produce inequitable results); *Barth* v. *Liberty Mut. Ins. Co.*, 212 Ark. 942, 946, 208 S.W. 2d 455, 457 (1948) (employer's lien could not be frustrated by assertion of a claim only for pain and suffering); *Heaton* v. *Kerlan*, 27 Cal. 2d 716, 723, 166 P.2d 857, 861 (1946) (noting that segregation of damages for pain and suffering is unnecessary, since employer's lien attaches to "entire amount" of a judgment "for any damages" under the statute); *Tarr* v. *Republic Corp.*, 116 N.H. 99, 103, 352 A.2d 708, 712 (1976) (that part of third party recovery based on pain and suffering and other elements of damages besides the loss of earning capacity are not to be deducted from the recovery on which the carrier's lien is to take effect; damages were

limited because of statutory limit on recovery for wrongful death).[9]

Only a few courts have considered a state workers' compensation reimbursement provision in a situation in which tort damages are limited by a no-fault scheme. In *Granger* v. *Urda*, 44 N.Y. 2d 91, 375 N.E. 2d 380, 404 N.Y.S.2d 319 (1978), the New York Court of Appeals construed the pre-1978 version of the New York workers' compensation statute to require reimbursement from an employee's third party recovery, despite the fact that that recovery did not include amounts for

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[9] See also *Stewart* v. *Hanover Ins. Co.*, 416 So. 2d 286, 289 (La. Ct. App.), review denied, 421 So.2d 907 (La. 1982) (compensation benefits recoverable by employer out of claimant's third party damages for pain and suffering, lost wages or general damages); *In re Travaglione's Estate*, 36 Misc. 2d 645, 232 N.Y.S. 2d 961 (1962) (carrier's lien for compensation and medical expenses paid first from proceeds of third party settlement for conscious pain and suffering of decedent); *Bumbarger* v. *Bumbarger*, 190 Pa. Super. 571, 576, 155 A.2d 216, 219 (1959) (in action against third party tortfeasor, insurance carrier's right of subrogation includes any amount recovered by injured party for pain and suffering); *Ellis* v. *Kenworth Motor Truck Co.*, 466 F. Supp. 441 (N.D. Tex. 1979) (under Texas law subrogation lien of worker's compensation carrier extends to entire amount of settlement after deduction of attorney's fee). But see *Rascop* v. *Nationwide Carriers*, 281 N.W. 2d 170, 173 (Minn. 1979) (subrogation does not extend to so much of a settlement as was earmarked for wife's loss of consortium); *Naig* v. *Bloomington Sanitation*, 258 N.W. 2d 891, 894 (Minn. 1977) (distinguishing between recoverable and nonrecoverable portions of settlement for purposes of workers' compensation); *Fontenot* v. *Hanover Insurance Co.*, 385 So.2d 238, 240 (La. 1980) (compensation carrier may not obtain reimbursement for medical expense payments from employee's award for pain and suffering, but may obtain judgment directly against the third person for any medical expenses not included in the employee's award); *LaGraize* v. *Bickham*, 391 So.2d 1185, 1192 (La. Ct. App. 1980) (award for pain and suffering was not subject to insurance carrier's lien for wages and medical benefits paid).

wage loss and medical expense because the New York no-fault statute requires deduction of "basic economic losses" from tort recoveries.[10] The court noted that in

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[10] The Michigan Supreme Court reached a different result in *Great American Insurance Co.* v. *Queen*, 410 Mich. 73, 300 N.W.2d 895 (1980). There the court held that a workers' compensation carrier had no right to reimbursement for medical expenses when damages covering those expenses would not be recoverable by the beneficiary in a third party tort action under the terms of the Michigan no-fault statute. The court did not rest its decision on the language of the Michigan workers' compensation statute, but on its conclusion that the state legislature intended the worker's compensation carrier to substitute for the no-fault insurer to the extent workers' compensation benefits take the place of no-fault benefits. 300 N.W.2d at 901. The court was persuaded that if the legislature had considered the application of the workers' compensation statute and the no-fault statute to the case of a motor vehicle accident occurring in the course of employment, it "would have explicitly provided" that the compensation carrier's reimbursement rights are coextensive with those of the no-fault insurer, *i.e.*, that they are limited to cases in which there is tort recovery for basic economic loss. *Id.* at 897. In cases other than those involving the no-fault statute, Michigan adheres to the general rule that an employee must reimburse his employer from any portion of his third party recovery, including damages for pain and suffering. See *Pelkey* v. *Elsea Realty & Investment Co.*, 394 Mich. 485, 232 N.W.2d 154 (1975).

In *Brunelli* v. *Farelly Bros.*, 266 Pa. Super. 23, 402 A.2d 1058 (1979), cited by the court of appeals in this case (Pet. App. 9a), the state court held that the workers' compensation insurer had no subrogation right to any recovery the injured employee was able to obtain from the tortfeasor since the Pennsylvania no-fault statute had abolished tort liability except for amounts in excess of "basic loss benefits." In *Brunelli*, the court considered only an attempt by the compensation carrier to intervene in the employee's third party action in order to assert subrogation rights to the extent of the compensation paid and payable. In denying intervention, the court noted that under the subrogation provision of the workers' compensation statute, the carrier's cause of action depended on that of the employee-victim. The provision at issue in *Brunelli*, unlike the FECA, refers to

enacting the no-fault law the legislature had chosen not to alter the "absolute" nature of the compensation carrier's lien, which attached to the "proceeds of any recovery" in favor of a compensation claimant against a third party. While the court recognized that application of both the absolute lien of the compensation carrier and the limit on tort recovery imposed by the no-fault statute could lead to a "harsh, unintended result," it declined to depart from a literal reading of the reimbursement provision. 44 N.Y. 2d at 99.[11] The reasoning of the New York court applies with equal force to the reimbursement provision of the FECA.

2. There is no indication in the legislative history of the FECA that Congress intended a departure from the plain language of the statute, so that employees would reimburse the compensation fund only from damages for medical expenses and lost wages. The predecessor to 5 U.S.C. 8132 was enacted in 1916, long before the advent of state no-fault statutes. See Act of Sept. 7, 1916, ch. 458, § 27, 39 Stat. 747-748. Even then, however, Congress recognized that third party recoveries might include noneconomic components, such as punitive damages and "damages brought about by reason of mental pain and suffering." 53 Cong. Rec. 10910 (1916) (remarks of Rep. Barkley). Congress also must have been aware that full reimbursement of FECA payments occasionally would require recovery

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subrogation, not to an independent right of reimbursement of the carrier from the employee's recovery. See Pa. Stat. Ann. tit. 77, § 671 (Purdon Cum. Supp. 1983).

[11] In 1978, following the decision in *Granger* v. *Urda*, the New York legislature amended the workers' compensation statute to provide that a compensation carrier shall not have a lien on the proceeds of the recovery in an action arising out of an automobile accident. See *Vinson* v. *Berkowitz*, 83 A.D.2d 531, 441 N.Y.S.2d 460, 462 (1981) (quoting News Memorandum of State Executive Department, McKinney's 1978 Session Laws of New York, at 1748).

from those noneconomic elements. For example, benefits paid under FECA could exceed the portion of a third party recovery representing economic damages because an employee was unsuccessful in persuading a jury of the full measure of his economic losses. Alternatively, an employee's recovery might be reduced as a result of application of the doctrine of comparative negligence,[12] or because he settled a third party action for less than the full amount of his claim. Congress nonetheless made no attempt to shield the noneconomic elements of damages from the obligation to reimburse.

The only concern Congress expressed in connection with the draft reimbursement provision was that it might be read to allow the government to credit an employee's third party recovery for one injury against compensation payments due for some *future* injury.[13] In response to that concern, Congress included lan-

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[12] By 1916, several states had enacted general comparative negligence statutes. See W. Prosser, *Law of Torts* 436 (4th ed. 1971).

[13] Representative Barkley explained this concern (53 Cong. Rec. 10910 (1916)):

> It ought to be assumed that all over and above the compensation that the Government may pay [an employee] for a particular injury, if he recovered it from a private corporation, ought to be his when other things are taken into consideration in the recovery of a verdict besides mere loss of time. There may be something the man is entitled to recover besides loss of time if he is compelled to go through life disfigured, with one ear gone or one eye out or one toe cut off, where he may not have been permanently disabled, but might be able to go back into the service of the Government and still perform his duties; and he ought not to have that sort of sword of Damocles always hanging over him for fear that if he became injured again under independent circumstances he might not be entitled to compensation on account of the subsequent injury, because a part of the former recovery is credited upon any future compensation to which he might be entitled.

See also *id.* at 10911.

guage stating that any surplus recovery by the employee should be credited against future amounts payable "on account of the same injury." 39 Stat. 747-748. But Congress did not include a provision immunizing any part of a recovery for an injury from the obligation to reimburse the government for compensation payments made in connection with that same injury. Indeed, it seems unlikely that Congress would have chosen to take this additional step in view of the concern expressed by legislators about the potential cost of the FECA program at the time the legislation was under consideration. See, *e.g.* H.R. Rep. 678, 64th Cong., 1st Sess. 13-14 (1916); 53 Cong. Rec. 10907, 10910-10911 (1916).

Nor is there any indication in subsequent amendments to the FECA that Congress intended the government's right to reimbursement to extend only to certain parts of an employee's third party recovery. Despite the growth of comparative negligence and no-fault statutes, Congress has retained the broad language of the original reimbursement provision. Indeed, Congress has amended the FECA in ways designed to encourage employees to bring third party actions and otherwise to protect the government's interest in reimbursement from third party recoveries. In 1966, Congress added a provision that guaranteed that an employee could retain at least one-fifth of the net amount of any third party recovery after deductions for a reasonable attorney's fee and other costs of recovery. Pub. L. No. 89-488, § 10, 80 Stat. 255.[14] That provision was expressly intended to provide an incentive for employees to bring third party actions in cases in which dam-

[14] The Petition and Reply Memorandum at the petition stage indicated that the one-fifth provision was enacted as part of the 1974 FECA amendments. In fact, the provision was first enacted as part of the 1966 amendments and was revised in minor respects in 1974.

ages recovered might be less than the amount of FECA compensation received, so that the employee himself otherwise would obtain nothing from the suit. Representative O'Hara explained.

> If an employee can be awarded a substantial amount of damages, he will then have something to show for his pains. But if the damages are less than the entire amount of compensation for which he might be eligible throughout the course of his disability, then he has been put to the trouble of bringing suit to no advantage to himself.

112 Cong. Rec. 5022 (1966).

In 1974, Congress again amended the FECA by, inter alia, adding a provision that grants the government a lien on any third party recovery. Pub. L. No. 93-416, § 15, 88 Stat. 1147.[15] The purpose of that provision is to expedite repayment of benefits to the compensation fund. See S. Rep. 93-1081, 93d Cong., 2d Sess. 3, 11 (1974). By 1974, the FECA had been construed to permit the government to obtain reimbursement from any part of an employee's third party recovery, including a recovery alleged to consist only of damages for pain and suffering. See *United States* v. *Hayes*, *supra*. In addition, by 1974 no-fault statutes had been enacted in a number of states, including Colorado, Connecticut, Florida, Hawaii, Massachusetts, Michigan, New Jersey, New York, and Utah. During 1974 itself, Georgia, Kansas, Kentucky, Minnesota, and Pennsylvania enacted no-fault statutes. Despite this trend, Congress failed to include in the 1974 FECA amendments any provision that would curtail the government's right of

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[15] The amendment to 5 U.S.C. 8132 provides:

> No court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States.

reimbursement in cases in which an employee's third party recovery is limited by a no-fault statute.

B. Reimbursement of the United States From All Elements of an Employee's Third Party Recovery Is Consistent With the Congressional Purposes Underlying Section 8132

Reimbursement of the United States from an employee's third party recovery, whether or not it includes damages for economic losses, is consistent with the purposes underlying 5 U.S.C. 8132.

1. The court of appeals itself recognized (Pet. App. 5a) that a major purpose of the reimbursement provision is to keep the compensation fund solvent and to minimize the overall cost of the FECA program. Indeed, minimization of FECA costs is the foremost purpose of the reimbursement provision. In *Dahn* v. *Davis*, 258 U.S. 421, 430 (1922), this Court stated that Congress provided for subrogation and reimbursement in cases involving third party liability "not for the purpose of increasing [the employees'] compensation, but for the purpose of reimbursing the Government for payments made and of indemnifying it against other amounts payable in the future." See also *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953 & n.4 (2d Cir. 1975); *Ostrowski* v. *Dep't of Labor, OWCP*, 653 F.2d at 231. That purpose is furthered by maximization of "the pool of dollars from which reimbursement must be made" (*Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. 200, 205 (E.D. Mich. 1979), aff'd, 653 F.2d 229 (6th Cir. 1981)).

Congressional reports on the FECA system have stressed the continuing importance of the reimbursement provision in reducing FECA costs. In a comprehensive report on the FECA system, issued in 1976, the House Committee on Government Operations noted the importance of third party recoveries and recommended that the Department of Labor "streamline its

method of handling such claims and give them much more attention so as to enhance the amount of money recovered by the Government through third party actions rather than subsidizing compensation payments that rightfully should be made by private parties." H.R. Rep. 94-1757, 94th Cong., 2d Sess. 29 (1976). See also *id.* at 7. In a 1979 report, the Comptroller General emphasized the need to improve the efficiency of reimbursement through third party recoveries, thereby helping to offset escalating compensation costs. He noted that the rationale of the reimbursement provision "is that the taxpayers should not have to bear the costs of compensation when a private party is liable or at fault." *Report of the Comptroller General: Labor Department Is Strengthening Procedures to Recover Costs for Federal Employees' Injuries Caused by Third Parties* 1 (May 9, 1979). Indeed, with annual FECA compensation outlays now nearing $1 billion (see page 10 & note 2, *supra*), reimbursement from third party recoveries is increasingly important to the financial viability of the program.

Requiring reimbursement from any element of an employee's damages award, even when a state no-fault statute limits recoveries to damages for noneconomic losses, clearly serves the purpose of minimizing the overall cost of the FECA program. Sixteen states currently have some form of full-fledged no-fault recovery scheme for automobile accidents; all of these schemes appear to limit third party tort recovery in connection with such accidents.[16] While we are unable to calculate

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[16] See Colo. Rev. Stat. §§ 10-4-701 *et seq.* (1973 & Cum. Supp. 1983); Conn. Gen. Stat. Ann. §§ 38-319 *et seq.* (West Cum. Supp. 1983); D.C. Code Ann. §§ 35-2101 *et seq.* (Cum. Supp. 1983); Fla. Stat. Ann. §§ 627.730 *et seq.* (West Supp. 1983); Ga. Code Ann. §§ 33-34-1 *et seq.* (1982 & Cum. Supp. 1983); Hawaii Rev. Stat. §§ 294-1 *et seq.* (repl. 1976 & Supp. 1982); Kan. Stat. Ann. §§ 40-3101 *et seq.* (1981); Ky. Rev. Stat.

with any precision the amount at stake on a nationwide basis, it certainly would be enough to have a significant impact on the FECA compensation fund.[17]

Ann. §§ 304.39-010 *et seq.* (repl. 1981 & Cum. Supp. 1982); Mass. Ann. Laws ch. 90, §§ 34A, 34M (Law. Co-op. 1975 & Cum. Supp. 1983); *id.*, ch. 231, § 6D (Law. Co-op. 1974); Mich Stat. Ann. §§ 24.13101 *et seq.* (Callaghan 1982 & Cum. Supp. 1983); Minn. Stat. Ann. §§ 65B.41 *et seq.* (West Cum. Supp. 1984); N.J. Stat. Ann. §§ 39:6A-1 *et seq.* (West 1973 & Cum. Supp. 1983); N.Y. Ins. Law §§ 670 *et seq.* (McKinney Cum. Supp. 1983); N.D. Cent. Code Ann. §§ 24-41-01 *et seq.* (repl. 1978 & Supp. 1983); Pa. Stat. Ann. tit. 40, §§ 1009.101 *et seq.* (Purdon Cum. Supp. 1983); Utah Code Ann. §§ 31-41-1 *et seq.* (repl. 1974 & Supp. 1983).

In addition, some states that do not have full-fledged no-fault statutes nevertheless have enacted certain no-fault features. See Ark. Stat. Ann. §§ 66-4014 *et seq.* (repl. 1980 & Cum. Supp. 1983); Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1981); Md. Ann. Code art. 48A, §§ 538 *et seq.* (repl. 1979 & Cum. Supp. 1983); N.H. Rev. Stat. Ann. §§ 264:15 *et seq.* (repl. 1982); Or. Rev. Stat. §§ 743.800 *et seq.* (repl. 1981); S.C. Code Ann. §§ 56.11.10 *et seq.* (Law. Co-op. 1976 & Cum. Supp. 1983); S.D. Codified Laws Ann. § 58-23-6 (rev. 1978); Tex. Ins. Code Ann. art. 5.06-3 (Vernon 1981); Va. Code §§ 38.1-380.1 *et seq.* (Cum. Supp. 1983); Wis. Stat. Ann. § 632.32 (West 1980 & Cum. Supp. 1983).

[17] As we indicated in our Petition (at 11), the Department of Labor informed us that at that time there were 48 pending third-party claims involving automobile accidents in Pennsylvania alone, with over $405,000 at stake. In addition, the Department was aware of 650 potential third party claims involving automobile accidents in Pennsylvania, with more than $6 million at stake. Since the Pennsylvania No-Fault Act provides for unlimited coverage of (and thus no tort recovery for) medical expenses, the government would be unable to recover any amount of FECA compensation it has paid for such expenses. The government would be able to obtain reimbursement for some portion of lost wages it has paid in connection with Pennsylvania automobile accidents, but only to the extent such payments to an individual exceed $15,000—the required no-fault coverage level for lost wages under the Pennsylvania No-Fault Act.

2. Requiring reimbursement from all elements of a third party recovery furthers another important purpose of the reimbursement provision—efficient administration of the FECA program. As the district court in *Ostrowski* explained (479 F. Supp. at 205), "by having only one standard for establishing the obligation to reimburse, Congress has eased the burden of administering FECA by avoiding the difficulties of distinguishing between the numerous statutory and common law causes of action found in the various states." A different rule—one that would require the Secretary of Labor to adjust the federal reimbursement scheme to accommodate various features of state law—would undermine the Secretary's ability to administer the FECA program in a uniform and efficient manner.

Adjustment of the federal scheme to take account of state no-fault provisions would create a significant administrative burden. Each state's no-fault system has its own peculiar features. The state no-fault statutes vary with respect to insurance coverage levels, extent to which tort liability is abolished, extent to which losses may be shifted through administrative mechanisms, thresholds below which tort actions may not be brought, subrogation rights, and a number of other features; in addition, state courts have not been uniform in their interpretations of no-fault provisions.[18] The Sec-

[18] For example, the New Jersey no-fault statute differs in various respects from the Pennsylvania statute, and differing bodies of case law have developed in each state. The New Jersey statute does not provide expressly for broad abolition of tort liability, as does the Pennsylvania statute. However, it includes a provision that evidence of amounts collectible or paid under no-fault coverage is inadmissible in a civil action for recovery of damages for bodily injury by an injured person. N.J. Stat. Ann. § 39:6A-12 (West 1973). The New Jersey Supreme Court has held that this provision prevents the injured person from recovering from a tortfeasor for amounts collectible or paid under the no-fault program and that the no-fault insurer

retary's right to reimbursement could vary from state to state if the federal statute had to be read in light of the operation of state law. The Secretary would be required to study the statutory scheme and developing case law in each no-fault state in order to determine how to administer the federal reimbursement provision in that state.[19] In view of the variations in no-fault statutes, it seems doubtful that the Secretary could count on administering the FECA reimbursement scheme in precisely the same manner in any two no-fault states.[20]

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may not be subrogated with respect to those amounts. *Aetna Insurance Co.* v. *Gilchrist Bros., Inc.*, 85 N.J. 550, 428 A.2d 1254 (1981). It is unclear whether the New Jersey courts would reach a similar conclusion in a case in which an employee had received workers' compensation benefits instead of no-fault benefits. Cf. *Sanner* v. *Government Employees Insurance Co.*, 150 N.J. Super. 488, 491, 494-495, 376 A.2d 180, 182, 184 (App. Div. 1977) (per curiam), aff'd, 75 N.J. 460, 383 A.2d 429 (1978) (per curiam) (dictum suggesting that the federal government could pursue a subrogation right against the tortfeasor to recoup benefits paid to military personnel under the Medical Care Recovery Act in connection with automobile accidents).

[19] The Secretary might also be required to study the statutes of states that have partial no-fault systems. See note 16, *supra*. For example, Delaware has what is sometimes refered to as a no-fault statute, Del. Code Ann. tit. 21, § 2118 (Cum. Supp. 1981), but it is generally viewed as having retained the traditional tort system of recovery. See *Burke* v. *Elliott*, 606 F.2d 375, 377 (3d Cir. 1979). Nevertheless, the government's right to reimbursement could be affected by Del. Code Ann. tit. 21, § 2118(g) (Cum. Supp. 1982), which provides that any person eligible for no-fault benefits may not plead in an action for damages against a tortfeasor those damages for which such benefits are available, whether or not the benefits are actually recoverable.

[20] Under the court of appeals' approach, the Secretary might even be required to distinguish among individual employees to determine how the no-fault scheme would affect reimbursement in a given case. The New Jersey Automobile Insurance Freedom of Choice and Cost Containment Act of 1984, ch. 362 (ap-

Administration of a uniform federal reimbursement requirement is clearly less burdensome than accommodation of each variation of state no-fault law. Under a uniform rule, the Secretary can use the same method to compute reimbursement for each of thousands of FECA claims filed each year.[21] Under the alternative interpretation embraced by the court of appeals, the Secretary would have to develop a separate set of reimbursement guidelines for each no-fault state; in addition, he might be forced to litigate in each no-fault state, both to clarify general principles under a particular no-fault scheme (since development of the no-fault case law is still at the beginning stages in some states) and to determine the application of those principles to FECA reimbursement. It is most unlikely that Congress intended to impose such administrative complexity in connection with a nationwide federal program that covers almost three million persons.

The court of appeals suggested (Pet. App. 7a-8a) that its interpretation of Section 8132 would not create a significant administrative burden because in the no-fault context it is clear that a third party recovery covers only noneconomic losses, so that it would be unnecessary to segregate different types of damages. In fact, depending on the seriousness of the injury and the level

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proved Oct. 4. 1983), requires, inter alia, that an individual be given the option of not purchasing no-fault coverage for nonmedical benefits (*i.e.*, loss of income, essential services, and funeral expenses); the option of entitling his insurer to reimbursement for medical expense benefits paid from any recovery for general damages (pain and suffering) sustained in an automobile accident and received by the insured (up to 20% of the amount of the recovery); and the option of limiting his right to sue for general damages. Lower insurance rates provide an incentive for individuals to choose one or more of these options.

[21] The Department of Labor advises us that in 1983 it identified over 13,000 work-related injuries of federal employees as having a potential for third party recovery.

of the ceiling on no-fault benefits under a particular state statute, some third party recoveries in cases like this one could include both economic and noneconomic elements. Moreover, as we have suggested, substantial administrative burdens can arise from the need to administer the reimbursement provision differently in each no-fault state, independent of the burden associated with apportionment of damages awards.

3. The court of appeals found it significant that reimbursement of the federal government was not necessary to prevent double recovery in this case, since the no-fault statute precluded respondent from recovering damages for basic economic losses in his third party tort action. Pet. App. 5a-7a. But there is little dispute that the government's right of reimbursement extends to some situations in which double recovery would not otherwise occur. See page 17 & note 6, *supra*. Indeed, the court of appeals acknowledged with its citation of *United States* v. *Hayes*, *supra* (Pet. App. 4a, 6a) that the government's right to reimbursement does not necessarily depend on the need to avoid double recovery in a given situation.

Moreover, if Congress had been concerned primarily with preventing double recovery, it could easily have drafted Section 8132 with precise language that would accomplish that goal. For example, Congress could have confined the government's right of reimbursement to an employee's damages for medical expenses, lost wages, and disability, or it could have expressly barred reimbursement from particular types of damages, such as pain and suffering. Congress's decision to write Section 8132 broadly suggests strongly that it was concerned less with double recovery than with minimizing the cost of the FECA program and the administrative burden on the Secretary—purposes that are clearly served by our reading of that provision.

C. The Reasoning Offered by the Court of Appeals in Support of Its Interpretation of Section 8132 Cannot Withstand Scrutiny

1. The court of appeals in effect concluded that Section 8132 must be read out of the FECA in cases like this one in order to accommodate the operation of the Pennsylvania no-fault scheme. The court was particularly troubled by what it perceived as the "unfairness" to federal employees that would result if the reimbursement provision were enforced in the no-fault context. The court explained that it rejected the Secretary's interpretation of Section 8132 "[i]n light of the recent growth of no-fault laws throughout the country and in view of the inherent hardship that will evolve upon those federal employees who, per chance, are subject to no-fault statutes" (Pet. App. 7a).

The court of appeals' "reinterpretation" of the FECA is inconsistent with this Court's admonition that comprehensive federal statutory compensation schemes are "not to be judicially expanded because of 'recent trends.'" *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, slip op. 11 (quoting *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 279 (1980)). In *Morrison-Knudsen*, the Court rejected the contention that employer contributions to union trust funds should be considered "wages" for purposes of computing compensation benefits under Section 2(13) of the LHWCA, 33 U.S.C. 902(13). Although the Court recognized that such fringe benefits have come to constitute a significant percentage of labor costs, it nevertheless held that alteration of the reasonable expectations of employers and their insurers is "a task for Congress." *Morrison-Knudsen*, slip. op. 12 (citing *J.W. Bateson Co.* v. *United States ex rel. Board of Trustees*, 434 U.S. 586, 593 (1978)). The Court noted that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harbor-

workers on the one hand, and their employers on the other" and that reinterpretation of the term "wages" would significantly "alter the balance achieved by Congress." *Morrison-Knudsen*, slip op. 11.

The FECA, like the LHWCA, is a comprehensive federal compensation scheme, under which Congress sought to strike a balance between the interests of employees and their employer, the federal government. See *Lockheed Aircraft Corp.* v. *United States*, slip op. 4; *Dahn* v. *Davis*, 258 U.S. at 431. The government's statutory right of reimbursement is a significant factor in that balance. See 258 U.S. at 430. Any "reinterpretation" of the FECA to limit that right of reimbursement in cases in which a state no-fault statute changes the scope of third party tort liability would alter the balance and therefore is a "task for Congress." *Morrison-Knudsen*, slip op. 12 (citations omitted). The New York legislature, confronted by broad statutory language that was interpreted by the courts to require reimbursement in the no-fault context, expressly revised the New York workers' compensation statute to take account of the operation of the New York no-fault statute (see pages 21-23 & note 11, *supra*). Unlike the New York legislature, Congress has not chosen to limit Section 8132, even though it has amended the FECA in other respects since the advent of state no-fault laws. In view of Congress's failure to act, there is no basis for the courts to limit the reach of Section 8132 in order to accommodate the state no-fault "trend."

2. In support of its interpretation of Section 8132, the court of appeals cited (Pet. App. 8a) the statement of the Senate committee that enactment of the 1974 FECA amendments would help the government achieve the position of "a model employer." S. Rep. 93-1081, 93d Cong., 2d Sess. 2 (1974).[22] In the court's

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[22] The court of appeals appears to have erred in citing the Senate report. The court referred to "S. Rep. No. 1124, 93rd Cong., 1st Sess., *reprinted in* (1974) U.S. Code Cong. & Ad.

view, this statement indicated that Congress intended that federal employees "be treated at least as well as their counterparts in private firms" (Pet. App. 8a). But the Senate committee's rhetorical statement hardly warrants the conclusion that the courts (as opposed to Congress itself) should revise the FECA reimbursement provision to create a compensation scheme that will fit perfectly with state no-fault schemes. In fact, the Senate committee's reference to the goal of making the federal government a "model employer" probably relates to the increases in benefit levels and improvements in timing of receipt of benefits that were the focus of the 1974 amendments, rather than to any feature of the reimbursement provision. To the extent Congress was concerned in 1974 with the government's right of reimbursement, it expressed that concern not by limiting reimbursement, but by strengthening that right through provision for a government lien on an employee's third party recovery.

In any event, we question the suggestion that requiring reimbursement in the no-fault context creates "unfairness" that would warrant restriction of reimbursement in a manner not provided by Congress. As we explained at pages 2-3, 10-11, *supra*, Congress, in enacting the FECA, gave injured federal employees the benefits of a speedy and certain recovery for work-related injuries, thus eliminating the barriers of sovereign immunity, proof of fault and absence of contributory negligence, and the expense and delay of prosecuting a negligence action. At the same time, Congress abolished any cause of action the employee otherwise might have against the government. 5 U.S.C. 8116(c). Congress presumably could have gone further and limited the employee's remedy for work-related injuries solely

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News 5341." Pet. App. 8a. However, it is S. Rep. 93-1081 that is reproduced at page 5341 of 1974 U.S. Code Cong. & Ad. News.

to FECA compensation by requiring (in exchange for FECA coverage) an unconditional assignment to the United States of any cause of action the employee might have against a third party. Under such a scheme, the government could choose whether to pursue the employee's cause of action and could use the entire recovery (in place of congressional appropriations) to replenish the compensation fund. Since Congress could have limited employees' rights more severely than it has under the existing scheme, it hardly seems "unfair" to require that an employee's third party recovery be applied first to make the government whole for the benefits it has paid out.

Moreover, Section 8132 itself contains a provision that mitigates the "unfairness" that may result from reimbursement. That section provides that an employee may retain one-fifth of any third party recovery, as well as an amount covering costs and a reasonable attorney's fee. Thus, even if the amount he recovers from a third party is less than the FECA compensation he has received, an employee is assured of obtaining a significant amount from a third party recovery.[23] Since the one-fifth provision ensures a rough sort of fairness to employees in any case of reimbursement, including a case in which an employee's recovery is diminished as a result of operation of a no-fault statute, there is no justification for the imposition of additional judge-made limitations on the government's right to reimbursement in the name of fairness.

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[23] Indeed, in this case there was no need even to reach the question of respondent's retention of one-fifth of the net tort recovery. Respondent recovered $8,500 from his settlement with the third party tortfeasor. The government sought reimbursement of only $1,600.24—leaving respondent with more than three-fourths of the proceeds of his third party settlement. See page 5 & note 1, *supra*.

3. To the extent there is any unfairness to federal employees in cases like this one, it results not from the FECA reimbursement provision, which predates by more than half a century all state no-fault schemes, but from the operation of the state laws themselves. As the district court in *Ostrowski* stated (479 F. Supp. at 206):

> Any discrepancy between the net recovery of an employee whose injury is covered by a no-fault statute and an employee whose injury is covered by common law or statute using only traditional tort concepts results not from a classification made by the Congress in FECA, but rather from the decisions of the individual states regarding the proper means of compensating personal injuries.

The court of appeals seemed to believe that when simultaneous application of the federal compensation statute and the state no-fault scheme would disadvantage an employee, the federal scheme must yield. The court cited the fact that workers' compensation carriers subject to Pennsylvania law can no longer recoup benefits from a third party recovery in connection with an automobile accident (see *Brunelli* v. *Farelly Bros.*, *supra*) and suggested that the federal statute could be construed in a similar manner to avoid conflict with the no-fault scheme. See Pet. App. 8a-9a.[24] But in requiring that a provision be read out of the federal statute in order to accommodate the operation of a state statute, the court has inverted the normal order in our federal-state system.

Of course, states are free to change the relationships among various parties subject to state control. More-

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[24] As we have noted above (pages 22-23, note 10), the state court in *Brunelli* was construing a subrogation provision in the context of a compensation carrier's attempt to intervene in the employee's third party action in order to assert a claim for the benefits it had paid, not an employer's independent claim under a reimbursement provision analogous to Section 8132.

over, it is entirely appropriate for the Pennsylvania courts to construe the Pennsylvania workers' compensation law in pari materia with the Pennsylvania no-fault statute. But states cannot alter the rights of the federal government under a federal statute without running afoul of the Supremacy Clause of the Constitution, Art. VI, Cl. 2. Congress is under no obligation to adapt its laws to the state scheme; nor can a state law be applied to defeat the objectives of a federal statute. See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). In the absence of action by Congress, if courts conclude that accommodation between the federal and state schemes is necessary, they must achieve that result through interpretation or alteration of *state* law, not federal law. See, *e.g.*, *Perez* v. *Campbell*, 402 U.S. 637, 649-650 (1971); *Sperry* v. *Florida*, 373 U.S. 379, 384 (1963).[25]

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[25] Here the Pennsylvania no-fault statute might reasonably be construed by the state courts not to require deduction of FECA benefits (or benefits paid under other programs with mandatory repayment provisions over which the state has no control) from the no-fault insurer's obligation, at least to the extent the federal statute requires reimbursement from third-party recoveries for noneconomic losses. See *Ostrowski* v. *Roman Catholic Archdiocese*, 479 F. Supp. at 206. The Pennsylvania courts have distinguished between exhaustible and inexhaustible benefits under Pa. Stat. Ann. tit. 40, § 1009.206 (Purdon Cum. Supp. 1983) and have held that exhaustible benefits are not within the class of benefits that are to be subtracted from the basic loss benefits a no-fault insurer must pay. See, *e.g.*, *Tankle* v. *Prudential Property & Cas. Ins. Co.*, 306 Pa. Super. 57, 61, 452 A.2d 1, 3 (1982); *Erie Insurance Exchange* v. *Sheppard*, 39 Pa. Commw. 30, 394 A.2d 1075 (1978). FECA benefits could be treated as exhaustible benefits under the Pennsylvania no-fault scheme without doing violence to either the federal statute or the state statute. Cf. *Bell* v. *Dep't of La-*

There is no justification for reading a provision out of a federal statute on the ground that a subsequently-enacted state statute does not mesh perfectly with the federal statutory scheme, as the court of appeals did here. Any alteration of Section 8132 to accommodate the effects of the Pennsylvania statute or any other state no-fault scheme is a task for Congress alone. In the absence of any indication that Congress has undertaken such an alteration, the right of the federal government to reimbursement of its compensation payments from respondent's third party recovery remains intact.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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bor, 560 F. Supp. 515, 523-524 (E.D. Pa. 1983), appeal pending, Nos. 83-1223 and 83-1269 (3d Cir.).

APPENDIX
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Employees' Compensation Act, 5 U.S.C. 8131, provides:

> (a) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the United States to pay damages, the Secretary of Labor may require the beneficiary to—
>
> (1) assign to the United States any right of action he may have to enforce the liability or any right he may have to share in money or other property received in satisfaction of that liability; or
>
> (2) prosecute the action in his own name.
>
> An employee required to appear as a party or witness in the prosecution of such an action is in an active duty status while so engaged.
>
> (b) A beneficiary who refuses to assign or prosecute an action in his own name when required by the Secretary is not entitled to compensation under this subchapter.
>
> (c) The Secretary may prosecute or compromise a cause of action assigned to the United States. When the Secretary realizes on the cause of action, he shall deduct therefrom and place to the credit of

the Employee's Compensation Fund the amount of compensation already paid to the beneficiary and the expense of realization or collection. Any surplus shall be paid to the beneficiary and credited on future payments of compensation payable for the same injury. However, the beneficiary is entitled to not less than one-fifth of the net amount of a settlement or recovery remaining after the expenses thereof have been deducted.

(d) If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in the Panama Canal Company to pay damages under the Law of a State, a territory or possession of the United States, the District of Columbia, or a foreign country, compensation is not payable until the individual entitled to compensation—

(1) releases to the Panama Canal Company any right of action he may have to enforce the liability of the Panama Canal Company; or

(2) assigns to the United States any right he may have to share in money or other property received in satisfaction of the liability of the Panama Canal Company.

The Federal Employees' Compensation Act, 5 U.S.C. 8132, provides:

> If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him for the same injury. No

court, insurer, attorney, or other person shall pay or distribute to the beneficiary or his designee the proceeds of such suit or settlement without first satisfying or assuring satisfaction of the interest of the United States. The amount refunded to the United States shall be credited to the Employees' Compensation Fund. If compensation has not been paid to the beneficiary, he shall credit the money or property on compensation payable to him by the United States for the same injury. However, the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States.

20 C.F.R. 10.503 provides:

If an injury for which benefits are payable under the Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, and, as a result of suit brought by the beneficiary or by someone on his or her behalf, or as a result of settlement made by him or her or on his or her behalf in satisfaction of the liability of such other person, the beneficiary shall recover damages or receive any money or other property in satisfaction of the liability of such other person on account of such injury or death, the proceeds of such recovery shall be applied as follows:

(a) If an attorney is employed, a reasonable attorney's fee and cost of collection, if any, shall first be deducted from the gross amount of the settlement;

(b) The beneficiary is entitled to retain one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted, plus an amount equiva-

lent to a reasonable attorney's fee proportionate to any refund to the United States;

(c) There shall then be remitted to the Office, the benefits which have been paid on account of the injury, which shall include payments made on account of medical or hospital treatment, funeral expense, and any other payments made under the Act on account of the injury or death;

(d) Any surplus then remaining may be retained by the injured employee or his dependents, and the net amount of damages received by the beneficiary shall be credited against future payment of benefits to which the beneficiary may be entitled under the Act on account of the same injury or death.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, § 1009.206(a) (Purdon Cum. Supp. 1983) (footnotes omitted), provides:

> Except as provided in section 108(a)(3) of this act, all benefits or advantages (less reasonably incurred collection costs) that an individual receives or is entitled to receive from social security (except those benefits provided under Title XIX of the Social Security Act and except those medicare benefits to which a person's entitlement depends upon use of his so-called "life-time reserve" of benefit days) workmen's compensation, any State-required temporary, nonoccupational disability insurance, and all other benefits (except the proceeds of life insurance) received by or available to an individual because of the injury from any government, unless the law authorizing or providing for such benefits or advantages makes them excess or secondary to the benefits in accordance with this act, shall be subtracted from loss in calculating net loss.

The Pennsylvania No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann. tit. 40, § 1009.301 (Purdon Cum. Supp. 1983) (footnote omitted), provides:

(a) Partial abolition.—Tort liability is abolished with respect to any injury that takes place in this State in accordance with the provisions of this act if such injury arises out of the maintenance or use of a motor vehicle, except that:

(1) An owner of a motor vehicle involved in an accident remains liable if, at the time of the accident, the vehicle was not a secured vehicle.

(2) A person in the business of designing, manufacturing, repairing, servicing, or otherwise maintaining motor vehicles remains liable for injury arising out of a defect in such motor vehicle which is caused or not corrected by an act or omission in the course of such business, other than a defect in a motor vehicle which is operated by such business.

(3) An individual remains liable for intentionally injuring himself or another individual.

(4) A person remains liable for loss which is not compensated because of any limitation in accordance with section 202(a), (b), (c) or (d) of this act. A person is not liable for loss which is not compensated because of limitations in accordance with subsection (e) of section 202 of this act.

(5) A person remains liable for damages for non-economic detriment if the accident results in:

(A) death or serious and permanent injury; or

(B) the reasonable value of reasonable and necessary medical and dental services, including prosthetic devices and necessary ambulance, hospital and professional nursing expenses incurred in the diagnosis, care and recovery of the victim, exclusive of diagnostic x-ray costs and rehabilitation costs in excess of one hundred dollars ($100) is in excess of seven hundred fifty dollars ($750). For purposes of this subclause, the reasonable value of hospital room and board shall be the amount determined by the Department of Health to be the

average daily rate charged for a semi-private hospital room and board computed from such charges by all hospitals in the Commonwealth; or

(C) medically determinable physical or mental impairment which prevents the victim from performing all or substantially all of the material acts and duties which constitute his usual and customary daily activities and which continues for more than sixty consecutive days; or

(D) injury which in whole or in part consists of cosmetic disfigurement which is permanent, irreparable and severe.

(6) A person remains liable for injury arising out of a motorcycle accident to the extent that such injury is not covered by basic loss benefits payable under this act, as described in section 103.

(b) Nonreimbursable tort fine.—Nothing in this section shall be construed to immunize an individual from liability to pay a fine on the basis of fault in any proceeding based upon any act or omission arising out of the maintenance or use of a motor vehicle: Provided, That such fine may not be paid or reimbursed by an insurer or other restoration obligor.